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No. 84-905

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEXAS AMERICAN BANK and VINCENT E. DRAIN, as Independent Co-executors of the Will of Milous Jackson Mitchell, deceased - - - Petitioners

versus

LEW C. SAYERS - - - - - Respondent

On Petition For Writ Of Certiorari To The Kentucky Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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QUESTION PRESENTED

Should the Court review the decision of the Kentucky Court of Appeals holding that the Due Process Clause of the Fourteenth Amendment was not violated by a Kentucky court's exercise of in personam jurisdiction over M. J. Mitchell, a non-resident engaged in buying, controlling, and selling banks in Kentucky, with respect to his breach of a contract made by him in Kentucky with Respondent Lew C. Sayers, a resident of Kentucky, for sale in Kentucky of a Kentucky bank, and for other services?

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No. 84-905

TEXAS AMERICAN BANK and
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Jackson Mitchell, deceased - - - *Petitioners*

v.

LEW C. SAYERS - - - - - *Respondent*

On Petition For Writ Of Certiorari
To The Kentucky Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Respondent, Lew C. Sayers, respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the Judgment of the Kentucky Court of Appeals because there are no special and important reasons to grant the Petition. The Kentucky court's exercise of in personam jurisdiction over M. J. Mitchell with respect to a cause of action arising out of his long continued banking business transactions in Kentucky merely involves application of well settled principles to another set of facts and does not offend Due Process under the Fourteenth Amendment to the United States Constitution.

I. COUNTERSTATEMENT OF THE CASE

A. Mitchell's Business Transactions in Kentucky.

This case arises out of the ongoing business and investment activities of Petitioners' decedent, M. J. Mitchell (Mitchell), in the Commonwealth of Kentucky beginning in the late 1960s and continuing through 1975. These activities include buying, controlling, and selling banks in Kentucky. The instant cause of action is Mitchell's breach of an oral contract made in Kentucky with Respondent Sayers, then a Kentucky resident, the performance of which included the sale of Mitchell's controlling stock in an Owensboro, Ky., bank.

Mitchell began his business transactions in Kentucky in approximately 1967, with the purchase of Central Bank and Trust Company (Central Bank), located in Owensboro, Ky. In 1970, Mitchell purchased the majority interest in Owensboro National Bank (ONB), also located in Owensboro, Ky. Mitchell owned shares in several other banks. His control over Kentucky banks became so extensive that Mitchell was charged with monopolizing interstate trade and commerce, in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §2 (West 1973 and Supp. 1984). *See, United States of America* v. *Owensboro National Bank, M. Jackson Mitchell, Raymond A. Alexander, and Edward B. Curtis,* C.A. #2529 (W.D. Ky. Owensboro Division 1970), wherein Mitchell was required to sell his stock in Central Bank and was enjoined from acquiring the controlling interest in any other bank in the Owensboro,

Ky., area and further enjoined from acting as an officer, director or agent for any other bank in the Owensboro, Ky., area for so long as he held stock in ONB. Mitchell was no stranger to the courts in Owensboro.

As a part of his business transactions in Kentucky, Mitchell made frequent visits to the state, and took an active role in the management of his banks. During 1970 Mitchell travelled to Kentucky four times to attend stockholders and board of directors meetings. He made six trips in 1971, twelve trips in 1972, thirteen trips in 1973 and 1974, and nine trips in 1975 to attend ONB directors and shareholders meetings. Kentucky and Illinois banks shared Mitchell's aircraft expense for attendance at these meetings.

Mitchell's business transactions in Kentucky were not limited to his status as a stockholder, director and active participant in the management of Kentucky banks. As owner of several banks, Mitchell also transferred loans from one bank to another, including the transfer of loans to ONB. In addition, he borrowed money from several Kentucky institutions. Mitchell negotiated his purchase of Central Bank in Kentucky and financed it through Citizens Fidelity Bank located in Louisville, Kentucky. His subsequent sale of Central Bank took place in Kentucky. Mitchell likewise bought ONB in Kentucky with money borrowed from Citizens Fidelity Bank. The sale of Mitchell's stock in ONB, arranged by Respondent as a part of his performance of the contract upon which this cause of action is based, occurred in Kentucky and was financed by a Kentucky bank.

B. The Breach of Contract Claim Which Arose Out of Such Transactions.

Respondent, Lew C. Sayers (Sayers) had been a business associate of Mitchell's since 1952. In 1970 Mitchell and Sayers entered into an oral contract by which Mitchell brought Sayers from Texas to Owensboro, Kentucky, to run Mitchell's newly acquired ONB. In payment for his services, Sayers was to receive one-half the profits from the sale of Mitchell's stock in ONB. This 1970 oral contract was not reduced to writing until October 2, 1975. Petitioner's Statement of the Case contains several inaccurate allegations concerning the 1970 oral contract between Mitchell and Sayers, *e.g.*, an alleged request to "carry" Sayers' investment and subsequent request for payment in Texas. (Petition for Writ of Certiorari, page 7). Since these allegations are not relevant to the issue before this Court, they will not be countered herein.

The contract which is the subject of this litigation was made on July 17, 1975. Sayers was at that time a Kentucky resident and in accordance with his 1970 oral contract with Mitchell, was acting as Chief Executive Officer and Senior Vice-President of ONB. On July 17, 1975, Sayers, while in his office at ONB, received a telephone call from Mitchell, who explained that he had received an urgent call from the FDIC stating that if Mitchell did not replace the Chief Executive Officer at First Bank & Trust Company of Mount Vernon, Illinois (First Bank), where Mitchell held a majority of the shares, with an official approved by the FDIC, the bank would be closed.

Mitchell asked Sayers to sell ONB at once, go to Mount Vernon to take over as Chief Executive Officer of First Bank, and to keep the bank open. In return for arranging the sale of the ONB stock, going to Mount Vernon, and taking over the management of First Bank, Mitchell offered Sayers one-half of any profits from the sale of Mitchell's stock in First Bank. Sayers accepted Mitchell's offer and immediately began performance of the contract.

Sayers sold the ONB, sold his home in Owensboro, moved to Mount Vernon, and accepted the position of Chief Executive Officer of First Bank. The bank was not closed, the loss trend was reversed, and the bank began operating at a profit. After Sayers completed performance of his part of the contract, and Mitchell's investment had been saved, Mitchell denied the existence of the July, 1975, oral contract.

C. Proceedings in the Kentucky Courts.

On November 3, 1981, Sayers filed suit in the Daviess Circuit Court at Owensboro, Kentucky, seeking enforcement of the contract, and alternatively requesting recovery under the doctrine of quantum meruit. This action was tried before the court on August 17-20, and September 2-3, 1982. Mitchell died on September 12, 1982, and the co-executors under his will, Petitioners herein, were substituted as defendants.

On April 6, 1983, the Daviess Circuit Court entered its Findings of Fact, Conclusions of Law and Judgment (Appendix, hereinafter referred to as A., p. 28) adjudging Sayers entitled to one-half of any of the

profits from the sale of Mitchell's stock in First Bank. Petitioners argued on appeal to the Kentucky Court of Appeals that the Kentucky court could not assert personal jurisdiction over Mitchell and that the oral contract was unenforceable under the statute of frauds. On May 14, 1984, the Court of Appeals affirmed the judgment of the Daviess Circuit Court (A., p. 20) and held its exercise of jurisdiction over Mitchell was within the bounds of the Kentucky Long Arm Statute and of the Due Process clause of the Fourteenth Amendment to the United States Constitution. The Kentucky Supreme Court by Order dated September 5, 1984, (A., p. 19) denied discretionary review of the Court of Appeals' Opinion.

II. REASONS FOR DENYING THE WRIT

A. There Are No Special and Important Reasons to Grant the Writ.

A writ of certiorari will be granted only upon special and important reasons (Sup. Ct. R. 17). There are no special and important reasons to review the Kentucky Court of Appeals decision applying Due Process decisions recognized by both parties as controlling to uncontradicted jurisdictional facts.

Mitchell's contacts with Kentucky are not so slight, nor is the connection between his business and investment transactions in this Commonwealth, and the cause of action asserted herein, so tenuous that the Court must grant review to define the minimum jurisdictional tie between this cause of action and Mitchell's contacts with the Kentucky forum. Mitchell's contacts far

exceed the minimum contacts required for exercise of jurisdiction over a non-resident.

Jurisdiction was acquired over Mitchell through the use of the Kentucky long-arm statute, K.R.S. §454.210. K.R.S. §454.210(2)(a) (Bobbs-Merrill 1975 and Supp. 1984) provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's
>
> 1) Transacting any business in this Commonwealth.

This long-arm statute "extends its reach to the limits of the federal due process clause." *National Can Corporation* v. *K. Beverage Co.,* 674 F. 2d 1134, 1136 (6th Cir. 1982) (citing *Davis H. Elliot Company* v. *Caribbean Utilities Company,* 513 F. 2d 1176 (6th Cir. 1975)); *See also, Poyner* v. *Erma Werke GMBH,* 618 F. 2d 1186, 1192 (6th Cir. 1980).

The evidence of Mitchell's buying, managing and selling banks in Kentucky from 1967 until 1975 is so overwhelming that Petitioners concede that he transacted business in Kentucky. This suit, wherein Sayers seeks to enforce a contract which required him to sell Mitchell's Kentucky bank and salvage Mitchell's Illinois bank, arises directly out of Mitchell's activity of buying, managing and selling banks in Kentucky and other states.

Acknowledging that the statutory requirements of K.R.S. §454.210(2)(a)(1) have been met, Petitioners argue that the application of the statute to Mitchell

offends Due Process. (Petition for Writ of Certiorari, p. 11). Due Process "permits personal jurisdiction over a defendant in any State with which the defendant has certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". *Calder* v. *Jones,* —— U. S. ——, 79 L. Ed. 2d 804, 811, 104 S. Ct. 1482 (1984) (quoting *International Shoe Company* v. *Washington,* 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945) and *Milliken* v. *Meyer,* 311 U. S. 457, 85 L. Ed. 278, 71 S. Ct. 339 (1940)). To determine whether the requisite minimum contacts are present, a court measures the relationship among the defendant, the forum, and the litigation. *Calder* v. *Jones,* 79 L. Ed. 2d at 811. Mitchell's continuous business transactions in Kentucky over an eight-year period and the resulting contract upon which this action is based confirms that Mitchell had the requisite minimum contacts with Kentucky.

Losing sight of the fact that Due Process requires no more than "minimum contacts" with the forum, and that in personam jurisdiction may be based upon even a single act within the forum, *e.g., McGee* v. *International Life Insurance Company,* 355 U. S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), Petitioners have focused on a narrow construction of the three criteria set forth in *Southern Machine Company* v. *Mohasco Industries,* 401 F. 2d 374 (6th Cir. 1968) to support the argument that the Kentucky Court of Appeals erred in holding Mitchell subject to the jurisdiction of the Kentucky courts. These criteria were delineated as guidelines

for determining the constitutional limits of long-arm statutes. Petitioners address each criterion in a vacuum as if it alone were necessary to the constitutional exercise of jurisdiction over a nonresident defendant, without regard to the other criteria or the purpose of the tripartite analysis. By way of example, Petitioners argue that the Kentucky Court of Appeals erred in citing *Davis H. Elliot Company* v. *Caribbean Utilities Co.,* 513 F. 2d 1176 (6th Cir. 1975) in its discussion of the third criterion, as Petitioners contend that the Sixth Circuit therein addressed only the first criterion. (Petition for Writ of Certiorari, p. 17) In fact, the court found all three criteria, which are inter-related, to be present. *Id.* at 1182.

Although the outermost limits of Due Process may require further delineation by this Court, as was done in *Helicopteros Nacionales de Columbia* v. *Hall,* ___ U. S. ___, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984), it is evident that the exercise of in personam jurisdiction over Mitchell does not reach these limits and is well within the permissible boundaries as heretofore defined. The Kentucky Court of Appeals found "Mitchell conducted extensive business in this Commonwealth," that "the cause of action arose on account of the extensive activities of Mitchell in Kentucky," and that "Mitchell's activities in Kentucky and the consequences caused by him in Kentucky have a substantial enough connection with this Commonwealth to make the exercise of jurisdiction reasonable." (A., pp. 24-25). Mitchell's "business activity in the Commonwealth" was the buying, controlling and selling of banks. Sayers'

cause of action against Mitchell is for the breach of a contract made in Kentucky to sell a Kentucky bank. The Kentucky court did not err in holding that the traditional notions of fair play and substantial justice were not offended by the exercise of in personam jurisdiction over Mitchell.

B. Sayers' Claim Arises Out of Mitchell's Business Transactions in Kentucky.

The Kentucky court did not exercise jurisdiction over Mitchell based on a single, isolated phone call to Sayers in Kentucky. The Court of Appeals ruled that the jurisdiction was based upon the fact that Mitchell conducted "extensive business" in Kentucky. (A., p. 24). The Court of Appeals noted "[i]n addition to buying and selling banks in Kentucky, he formed the contract that is the subject of this lawsuit in Kentucky when Sayers accepted his telephone offer on July 17, 1975." (A., p. 24). The fact that the contract with Sayers was formed in Kentucky is not, as contended by Petitioners, insignificant for the purpose of determining whether the state has the authority to assert personal jurisdiction over Mitchell. The contract formed in Kentucky with a Kentucky resident is but one more aspect of Mitchell's business transactions in Kentucky. In contrast is *Rene Boas Associates* v. *Vernier,* 257 N.Y.S. 2d 487, 22 A. 2d 561 (1965), cited by Petitioners (Petition for Writ of Certiorari, p. 13), wherein the court in denying in personam jurisdiction over a nonresident defendant emphasized that the agreement upon which the suit was based was not negotiated or concluded by the defendant in the forum state.

Xedit Corporation v. *Harvel Industries,* 456 F. Supp. 725 (S.D.N.Y. 1978) and *Rene Boas Associates* v. *Vernier,* 257 N.Y.S. 2d 487, 22 A. 2d 561 (1965), are the only cases upon which Petitioners rely to support the argument that the cause of action did not arise out of Mitchell's transactions in Kentucky. (Petition for Writ of Certiorari, pp. 12-15). Neither case rests on the constitutional argument raised by Petitioners. Instead, these decisions deal exclusively with the language of the New York long-arm statute. Unlike the defendants therein, Mitchell had continuous contacts with the forum state both before and after he entered into the oral contract with Sayers. Sayers introduced evidence of forty-four phone calls made by Mitchell to various business associates in Kentucky in the year of 1975. After Sayers arranged the sale of the ONB stock, Mitchell personally attended and participated in the closing which occurred in Louisville, Kentucky. The continuing business between Sayers and Mitchell following the sale of ONB is evidenced by six telephone calls made by Mitchell to Sayers at his residence in Owensboro after ONB was sold.

Petitioners' argument that the cause of action did not arise out of or in connection with Mitchell's buying, managing and selling banks in Kentucky ignores the terms of the contract upon which this action is based. Sayers, who was brought to Kentucky by Mitchell to manage ONB, was required by the 1975 contract to arrange for the sale of Mitchell's stock in ONB. The

contract could not be more directly related to Mitchell's business activities of buying, managing and selling banks.

It is "only when the operative facts of the controversy are not related to the defendant's contacts with the state [that it can] be said that the cause of action does not arise from that contract." *Southern Machine Company* v. *Mohasco Industries,* 401 F. 2d at 384, n. 29. Sayers was required under the 1975 contract with Mitchell to sell Mitchell's stock in ONB, leave his home in Owensboro, move to Mount Vernon and take over the management of First Bank. In return, Mitchell promised to pay Sayers one-half the profits from the sale of First Bank. Mitchell's prior activity of buying, managing and selling Kentucky banks is more than "a link in the chain of events" leading to Sayers' cause of action. (Petition for Writ of Certiorari, p. 15). The "operative facts" of this controversy arose from the obligations created by and the actions performed under the 1975 contract. *Southern Machine Company* v. *Mohasco Industries, Id.*

C. Kentucky Has an Interest in Resolving the Controversy Between Sayers and Mitchell.

The Kentucky Court of Appeals held that "Mitchell's activities in Kentucky and the consequences caused by him in Kentucky had a substantial enough connection with this Commonwealth to make the exercise of jurisdiction over him reasonable." (A., p. 25). This is confirmed by examining the substantial business connections which Mitchell had in Kentucky at the time he entered into the contract with Sayers.

A key factor in weighing the strengths of Kentucky's connection to the cause of action is whether the cause of action arises out of the defendant's attempt to benefit from the laws of Kentucky by entering into its market. *Thermothrift Industries* v. *Mono-term Insulation Systems,* 450 F. Supp. 398, 403 (W.D. Ky. 1978). Mitchell purchased two Kentucky banks and financed these purchases through Kentucky lending institutions. He actively participated in the management of these banks which required frequent trips to Kentucky from 1970 to 1975.

In 1975 Mitchell entered into a contract with Sayers, a Kentucky resident. As a result of the 1975 contract, Sayers sold Mitchell's stock in ONB for approximately $9,000,000. The fact that Mitchell's business transactions in Kentucky continued over an extended period of time and involved a substantial amount of money is alone enough to satisfy the minimum contacts test. *See, First National Bank of Louisville* v. *Shore Tire Company,* 651 S. W. 2d 472, 474 (Ky. App., 1983). After Sayers performed the contract, Mitchell denied its existence. Kentucky has a substantial interest in seeing that its residents get the benefit of their bargains. *First National Bank of Louisville* v. *J. W. Brewer Tire Company,* 680 F. 2d 1123, 1126 (6th Cir. 1982). Petitioners "cannot complain if along with the profits from the [Kentucky] market [they] must also accept the process from the [Kentucky] courts." *National Can Corporation* v. *K Beverage Company,* 674 F. 2d at 1138, quoting *Southern Machine Company* v. *Mohasco Industries.*

Petitioners place much significance on the fact that Sayers was not a Kentucky resident at the time this suit was brought. (Petition for Writ of Certiorari, p. 16). Yet, if it were not for the 1975 oral contract with Mitchell, Sayers would still be a resident of Kentucky. Having first located in Owensboro, Kentucky, to run ONB at the request of Mitchell, Sayers established permanent residency in Kentucky and planned to spend the remainder of his life in Owensboro. He moved to Mount Vernon, Illinois, at the insistence of Mitchell that First Bank would be closed if Sayers could not, as Mitchell phrased it, "get the ox out of the ditch." Sayers' change in residency did not deprive him of the use of the Kentucky courts. It has long been the position of the Kentucky courts that a nonresident plaintiff is not prevented from instituting an action in Kentucky against a nonresident defendant. *Bishop* v. *Jackson,* 91 S. W. 263, 264 (Ky., 1906).

Regardless, the fact that neither of the parties is a resident of the forum state is immaterial to the determination of whether the court may exercise jurisdiction over a nonresident defendant. This Court has on several occasions refused to hold that a state has no interest in providing a forum for suits between nonresidents. *E.g., Calder* v. *Jones; Perkins* v. *Benguet Consolidated Mining Company,* 342 U. S. 437, 96 L. Ed. 485, 72 S. Ct. 413 (1952). Most recently this Court rejected the argument that New Hampshire had no interest in providing a forum for a libel action brought by New York residents against an Ohio corporation noting, "we have not to date required a plaintiff to

have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking." *Keeton* v. *Hustler Magazine, Inc.*, —— U. S. ——, 79 L. Ed. 2d 790, 800, 104 S. Ct. —— (1984).

Petitioners err in challenging that Sayers has not cited any authority which holds that a state has in personam jurisdiction over a nonresident defendant in an action brought by a nonresident plaintiff to enforce an agreement not negotiated or executed in the forum state involving stock in a nonresident corporation. *National Can Corporation* v. *K Beverage Company,* 674 F. 2d 1134 (6th Cir. 1982), cited by Sayers in the proceedings below, contains facts similar to the hypothetical posed by Petitioners. Plaintiff therein, a Delaware corporation, brought an action in Kentucky against five defendants to enforce personal guarantees on a note of a Colorado corporation doing business in Kentucky. The guarantees were signed in North Dakota and mailed to plaintiffs in Illinois. *National Can Corporation* v. *K Beverage Company, Id.*, at 1136.

One of the five defendants was the wife of an officer and stockholder of the Colorado corporation. This defendant, a North Dakota resident, had "never set foot in Kentucky." *Id.* at 1137. She was not a stockholder in the Colorado company, but held a marital interest in her husband's stock. *Id.* Her sole connection with Kentucky was that, as a holder of a marital interest in the corporation, she executed a personal

APPENDIX

SUPREME COURT OF KENTUCKY

84-SC-462-D
(83-CA-1186-MR)

TEXAS AMERICAN BANK and VINCENT E. DRAIN, as Independent Co-Executors of the Will of MILOUS JACKSON MITCHELL, Deceased - *Movants*

v.

LEW C. SAYERS - - - - - *Respondent*

DAVIESS CIRCUIT COURT

#81-CI-1242

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Texas American Bank and Vincent E. Drain, as Independent Co-Executors of the Will of Milous Jackson Mitchell, deceased, for a review of the decision of the Court of Appeals is denied.

ENTERED September 5, 1984.

(s) Robert F. Stephens
Chief Justice

OPINION RENDERED: May 18, 1984; 10:00 a.m.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. 83-CA-1186-MR

TEXAS AMERICAN BANK and VINCENT E. DRAIN, as Independent Co-Executors of the Will of MILHOUS JACKSON MITCHELL, Deceased - *Appellants*

v.

LEW C. SAYERS - - - - - - *Appellee*

**APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
ACTION NO. 81-CI-1242**

AFFIRMING

BEFORE: REYNOLDS and WILHOIT, Judges, PAXTON, Special Judge.

PAXTON, Special Judge. Texas American Bank and Vincent E. Drain, independent co-executors of the estate of Milhous Jackson Mitchell,[1] appeal from a judgment of the Daviess Circuit Court, sitting without a jury, which determined that it had personal jurisdiction over Mitchell under KRS 454.210, the "long arm" statute, and that Mitchell and Lew C. Sayers entered into an enforceable oral contract on or about July 17, 1975.

Mitchell and Sayers were residents of Texas, and acquaintances for several years before Mitchell purchased 36% of the outstanding Owensboro National Bank stock in

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[1]Mr. Mitchell passed away within a few days after conclusion of the trial.

1970. Shortly thereafter, Sayers moved from Texas, established residence in Owensboro, and, on Mitchell's recommendation, was appointed to the dual positions of senior vice-president and chief executive officer of ONB. At the time he purchased the ONB stock, Mitchell owned a controlling interest in Central Bank & Trust Company of Owensboro, and a considerable number of shares in First Bank & Trust Company of Mt. Vernon, Illinois. Sayers stayed with ONB until the latter part of August, 1975, and was hired by First Bank & Trust Company as its chief executive officer on October 10th of that same year. He remained with First Bank & Trust Company until November, 1978, when he resigned and moved back to Texas. He was a resident of Texas when he filed this action in the Daviess Circuit Court alleging that he and Mitchell entered into an oral contract on July 17, 1975, and asking the court to require Mitchell to award him 50% of the profits on Mitchell's stock in First Bank & Trust when it was sold. Mitchell moved for dismissal of the action because, inter alia, the Daviess Circuit Court lacked jurisdiction over his person. The trial court denied the motion, and Mitchell then answered, denying the oral contract, and he again asserted lack of personal jurisdiction over him by the trial court.

After several days of trial, the trial court again held that it had personal jurisdiction over Mitchell by virtue of the "long arm" statute, KRS 452.210. The trial court also found that by telephone call of July 17, 1975, from Mitchell in Texas to Sayers in Owensboro, the parties entered into an oral contract which provided that in exchange for one-half of the profit derived from the sale of Mitchell's stock in First Bank & Trust, Sayers would:

1. Negotiate the sale of Mitchell's stock in ONB;
2. Resign his position as senior vice-president and chief executive officer of ONB;

3. Move to Mt. Vernon, Illinois, and take the position of chief executive officer of First Bank and Trust Company; and,
4. Keep the First Bank & Trust Company open, or, "get the ox out of the ditch."

Based upon its findings of fact and conclusions of law, the trial court entered judgment that:

> Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company[1] of Mt. Vernon, Illinois under a valid and enforceable contract. Defendants are required to sell the stock in the bank within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

This appeal by the co-executors ensued.

The co-executors argue:

1. The Kentucky Courts cannot assert personal jurisdiction over Mitchell in this case, and
2. Assuming the Kentucky Courts have personal jurisdiction over Mitchell, the alleged oral agreement is unenforceable under the Statute of Frauds.

Appellants apparently concede that there is sufficient evidence in the record to substantiate the finding of the trial court that Mitchell and Sayers did enter into an oral contract. They argue, however, that even if there was a contract, it was void and unenforceable under KRS 371.010, the Statute of Frauds, because it could not be performed within one year from July 17, 1975, the date of its execution. This argument is predicated upon the notion that the

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[1]The judgment has been amended to reflect the new name of the bank—Mt. Vernon Bancorp, Inc.

contract called for Sayers to stay at First Bank & Trust until its stock was saleable at a profit to Mitchell. However, the trial court specifically found that the contract called for Sayers to "Keep the First Bank & Trust Company open, or, 'get the ox out of the ditch'." Contrary to the appellants' contention, there is adequate evidence in the record to support this finding. There was evidence, for example, to the effect that Mitchell feared in July of 1975 that First Bank & Trust would be closed unless its then chief executive officer was immediately replaced with a person satisfactory to the F.D.I.C. It could reasonably be inferred, from this evidence alone, that Sayers' main obligation under the contract was to keep First Bank & Trust Company from being closed. He performed that part of the contract within one year from July 17, 1975.

Appellants' main contention is that Daviess Circuit Court did not have personal jurisdiction over Mitchell when this lawsuit was filed. Mitchell, being a resident of Texas, is not subject to the jurisdiction of Kentucky courts unless our "long arm" statute, KRS 454.210(2)(a), is applicable; it provides:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth.

The purpose of the statute is to ensure that Kentucky courts comply with federal constitutional requirements of due process before asserting personal jurisdiction over non-resident defendants. Courts have interpreted Kentucky's statute to extend to the outer limits of the due process clause. *See First National Bank of Louisville* v. *J. W. Brewer Tire Co.*, 680 F. 2d 1123 (6th Cir. 1982). Both sides agree that this Court, in *Tube Turns Division of Chemetron Corp.* v. *Patterson Co., Inc.*, Ky. App., 562

S. W. 2d 99 (1978), accurately stated the test for meeting the constitutional and statutory requirements of due process:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from defendant's activities there. Finally, the activities of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

Id. at 100. We believe all three criteria of *Tube Turns* have been met by Mitchell's actions in this case. First, he conducted extensive business in this Commonwealth. The co-executors cite *Lamar* v. *American Basketball Association*, 468 F. Supp. 1198 (S.D.N.Y. 1979), in support of their argument that Mitchell's activities as a shareholder and director of Central Bank & Trust Company and ONB do not constitute the transacting of business by Mitchell in Kentucky within the meaning of the "long arm" statute. The problem with this argument is that Mitchell's activities in Kentucky transcended, by far, representation of his corporate interests. He owned a controlling interest in Central Bank & Trust and ONB at the same time. He arranged for the purchase and sale of Central Bank & Trust and ONB in Kentucky. He financed the purchase of the two banks through Citizens Fidelity Bank & Trust Company of Louisville. We believe the evidence shows Mitchell's interests as a shareholder and director in the Kentucky banks to be secondary to his personal business of buying and selling them.

Second, the cause of action arose on account of the extensive activities of Mitchell in Kentucky. In addition to buying and selling banks in Kentucky, he formed the con-

tract that is the subject of this lawsuit in Kentucky when Sayers accepted his telephone offer on July 17, 1975. 17 Am. Jur. 2d *Contracts* § 53 (1964). The contract caused activity in Kentucky because, pursuant to its terms, Sayers was required to sell the ONB stock, resign as senior vice-president and chief executive officer of ONB, and move from Owensboro to Mt. Vernon, Illinois. The executors argue that sale of the ONB stock was fully covered in a prior written agreement between Mitchell and Sayers. That is only partially true, because, although the prior written agreement did provide that Sayers would share in the profits of the ONB stock, it did not require Sayers to handle the sale, and it did not provide for a particular time of sale. The oral agreement required Sayers to sell the stock on behalf of Mitchell, and it mandated a speedy sale.

Finally, we believe Mitchell's activities in Kentucky, and the consequences caused by him in Kentucky, have a substantial enough connection with this Commonwealth to make the exercise of jurisdiction reasonable. "Both the first and second prongs are met when a dispute arises from a substantial business contract with a corporation based in another jurisdiction. The third factor looks to the extent of the forum state's interest and whether exertion of jurisdiction over the particular defendant is fair. When the first two elements are met, an inference arises that the third, fairness, is also present; only the unusual case will not meet this third criterion. Among other considerations, fairness is judged by whether the buyer (1) is an 'active' or 'passive' one (2) could foresee a foreign suit, and (3) has physical contacts with the forum state." *First National Bank of Louisville* v. *J. W. Brewer Tire Co., supra,* at 1126. Again, Mitchell meets all the criteria. He was certainly an "active" participant in forming the oral contract with Sayers and creating the conditions in Kentucky that

brought about ONB's role in the contract. Mitchell should have foreseen a lawsuit against him in Kentucky, because he had previously been sued in the United States District Court for the Western District of Kentucky by the United States Government on account of his banking activities in Daviess County. Such a suit should not have been considered onerous by Mitchell because during 1975, the year in which he made the contract with Sayers, he had frequent contacts with Owensboro, including trips for shareholder and directors' meetings of ONB.

In any event, Kentucky has an interest in seeing that contracts formed in this Commonwealth are carried out. "Failure to honor a contractual obligation incurred in a state cannot reasonably be said to be without consequence there. The effects of such a breach of contract on the general conduct of business may not be readily quantifiable, but they are, nevertheless, real." *Davis H. Elliot Co.* v. *Caribbean Utilities Co.,* 513 F. 2d 1176, 1181-82 (6th Cir. 1975).

Appellants also complain that the trial court adopted the findings of fact and conclusions of law prepared by Sayers' attorneys. We can tell by the transcript of evidence that the trial judge put an enormous amount of time and effort into this case. He very patiently allowed appellants' counsel to repeatedly argue the jurisdiction issue and he presided over several days of trial in a most deliberate and conscientious manner. We believe this issue is controlled by *Bingham* v. *Bingham,* Ky., 628 S. W. 2d 628, 629 (1982):

> There has been no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind. The evidence adduced at trial clearly supports the findings of fact and conclusions of law announced by

the court and in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under CR 52.01, they are not to be easily rejected.

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY

DAVIESS CIRCUIT COURT

DIVISION I

81-CI-1242

LEW C. SAYERS - - - - - - - *Plaintiff*

vs.

TEXAS AMERICAN BANK (Formerly Exchange Bank & Trust Company) and JOHN B. STIGALL, JR., as Independent Co-Executors of the Will of Milous Jackson Mitchell, deceased - - - - - - - *Defendants*

FINDINGS OF FACT — CONCLUSIONS OF LAW — AND JUDGMENT — Entered April 6, 1983

This Court trial lasted six days. When the case was submitted for decision the Court requested that each side file a trial brief and a proposed Findings of Fact, Conclusions of Law and a Judgment. It was mutually agreed that the entire Court transcript would be prepared by the Court Reporter before the requested Briefs, Findings, Conclusions and Proposed Judgment would be submitted. All of the above requirements have now been completed and the case has been submitted to the Court for decision.

Now, being duly advised, the Court has read and considered the lengthy court record, the excellent trial briefs, and the proposed Findings of Fact and Conclusions of Law submitted by counsel for both parties. The Court hereby generally adopts and affirms the Findings of Fact and Conclusions of Law #1, submitted by the attorneys for the Plaintiff which are copied herein as the Court's own Findings of Fact and Conclusions of Law. Reference is made

herein to the various volumes of the trial record for evidence supporting the findings of the Court.

FINDINGS OF FACT

(1) On or about July 17, 1975, plaintiff, Lew C. Sayers, and defendants' decedent, M. J. Mitchell (also known as Milous Jackson Mitchell), entered into an oral agreement (Tr. Vol. I, page 33, lines 9-14; page 39, lines 15-18; Vol. II, page 236, lines 20-25; page 248, lines 19-25; page 249, lines 1-2; page 252, lines 17-25; page 253, lines 1-4; page 254, lines 11-25; page 255, lines 1-9).

(2) Sayers, on that date, was chief executive officer and senior vice-president of the Owensboro National Bank, earning a salary of $50,000 with additional fringe benefits (Tr. Vol. I, page 28, lines 10-23).

(3) Mitchell, on that date, was principal owner of the stock of the Owensboro National Bank, a sound and thriving bank. Mitchell also owned 62% or 266,600 shares of stock in First Bank & Trust Company of Mt. Vernon, Illinois, a bank in serious financial condition. His cost basis in this stock was $12.50 per share (Tr. Vol. I, page 31, lines 21-23; page 32, lines 11-23; page 94, lines 16-25; Vol. IV, page 452, lines 10-13).

(4) The oral contract entered into between Sayers and Mitchell on or about July 17, 1975, provided that Sayers was to negotiate the sale of Mitchell's stock in Owensboro National Bank, resign his position as chief executive officer and senior vice-president of Owensboro National Bank, move to Mt. Vernon and take the position of chief executive officer of First Bank & Trust Company and keep the bank open or, "get the ox out of the ditch" (Tr. Vol. I, page 33, lines 15-25; page 34, lines 1-4; page 93, lines 2-22). In return for these services, Mitchell was to pay Sayers one-half the profit derived from the sale of his stock in

First Bank & Trust Company of Mt. Vernon, Illinois (Tr. Vol. I, page 35, lines 18-25; page 36, lines 1-3; page 94, lines 9-15).

(5) The parties did not specify the duration of Sayers' employment at First Bank & Trust Company of Mt. Vernon, Illinois, but both parties expected Sayers' performance to be completed within one year (Tr. Vol. I, page 54, lines 14-18; Vol. III, pages 338-340).

(6) Sayers negotiated the sale of the Owensboro National Bank stock (Tr. Vol. I, pages 40-49; Gatton dep., pages 5-9), resigned his position at the Owensboro National Bank, moved to Mt. Vernon, Illinois (Tr. Vol. I, page 49, lines 5-8; page 52, lines 10-14), and became the chief executive officer and president at First Bank & Trust Company of Mt. Vernon, Illinois at a reduced salary of $25,000 per year (Tr. Vol. I, page 53, lines 21-25; page 54, lines 1-6).

(7) Sayers served as president of First Bank & Trust Company from November of 1975 until June of 1978 and as chief executive officer from October of 1975 until November of 1978 (Tr. Vol. I, page 71, lines 13-23; plaintiff's exhibit no. 9).

(8) Immediately upon assuming his duties at First Bank & Trust Company, Sayers made dramatic changes at the bank in performance of the contract, among them, instituting training programs, personnel changes and adopting new accounting procedures (Tr. Vol. I, page 63, lines 5-25; page 64, lines 1-22; page 67, lines 3-25; Vol. II, page 243, lines 1-11). Sayers personally supervised the loan department (Tr. Vol. II, page 243, lines 12-17). He switched computer companies, added a controller and hired a new external auditor (Tr. Vol. I, page 63, lines 5-25; page 64, lines 1-22).

(9) During Sayers' tenure as chief executive officer and president, and due primarily to his efforts, leadership and the changes he instituted, the bank was restored to a

sound and prosperous financial condition (plaintiff's exhibit no. 22).

(10) Prior to his arrival, during the years 1973, 1974 and 1975, First Bank & Trust Company of Mt. Vernon, Illinois suffered losses in the amount of $340,403, $390,536 and $869,075, respectively (plaintiff's exhibit no. 22).

(11) By January of 1976, the bank began to record a profit, less than one year after the parties entered into the contract. By September 9, 1976, First Bank & Trust Company reported a profitable eight months straight (Tr. Vol. I, page 65, lines 21-24; plaintiff's exhibit no. 7).

(12) In 1976, the losses for the bank were reduced to $63,645. By 1977 and 1978, the bank profits were raised to $156,645 and $627,000, respectively (plaintiff's exhibit no. 22).

(13) Although Sayers continued to serve as chief executive officer and president of the bank, by preventing the closing of the bank upon his arrival, immediately instituting personnel and policy changes (Tr. Vol. I, pages 63-64), and successfully placing the bank in a profit-making position (plaintiff's exhibit no. 7; plaintiff's exhibit no. 22), Sayers fully performed his part of the oral contract within a period of one year.

(14) Sayers received no payment for his arrangement of the sale of Mitchell's stock in Owensboro National Bank to Bill Gatton (Tr. Vol. I, page 104, lines 8-12).

(15) Mitchell denied the execution of the contract and refused to compensate Sayers for saving his investment in First Bank & Trust Company of Mt. Vernon, Illinois (Tr. Vol. IV, page 454, lines 8-9; page 565, lines 5-11).

CONCLUSIONS OF LAW

(1) The oral contract entered into between Sayers and Mitchell on or about July 17, 1975, is a binding and enforceable contract. KRS 371.010 (7).

(2) Under the terms of the contract, Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company of Mt. Vernon, Illinois.

(3) Plaintiff, having fully performed the contract with nothing remaining but his payment, this contract will be enforced against defendants according to its terms. Cf. *Salyers* v. *Kenmont Coal Company*, 226 Ky. 655, 11 S. W. 2d 705 (1928).

(4) Although the parties placed no duration date on Mitchell's performance of this contract, it is within the equitable powers of the Court to place a termination date on this contract in enforcing its terms. *East Tennessee Telephone Company* v. *Paris Electric Company*, 156 Ky. 762, 162 S. W. 530 (1914).

(5) In view of the death of M. J. Mitchell and the obvious need to settle his estate, this Court will exercise its equitable powers in granting specific performance of the contract. Defendants are ordered to sell the stock in First Bank & Trust Company of Mt. Vernon, Illinois within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

JUDGMENT

It Is Hereby Ordered And Adjudged that Sayers is entitled to one-half the profits from the sale of Mitchell's stock in First Bank & Trust Company of Mt. Vernon, Illinois under a valid and enforceable contract. Defendants are required to sell the stock in the bank within one year from the date of this judgment, with the sale to be conducted under reasonable commercial standards.

This Judgment was prepared by the Court and entered of record on this the 6th day of April, 1983, at the costs of the Defendants. This is a final and appealable Judgment and there is no reason for delay.

(s) Henry M. Griffin, Judge
Daviess Circuit Court, Division I

Copies of this Findings of Fact, Conclusions of Law, and Judgment were this date delivered by the Court to:

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NO. 84-905

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEXAS AMERICAN BANK and VINCENT E. DRAIN, as Independent Co-Executors of the Will of Milous Jackson Mitchell, Deceased — PETITIONERS

-vs-

LEW C. SAYERS — RESPONDENT

CERTIFICATE OF SERVICE

I, Morton J. Holbrook, a member of the Bar of this Court, certify in accordance with Supreme Court Rule 28.3 and 28.5(b) that three copies of this Brief in Opposition to Petition for Writ of Certiorari to the Kentucky Court of Appeals were deposited in a United States mail box with first class postage prepaid addressed to Bert T. Combs, Esq. and Francis J. Mellon, Jr., Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, Kentucky 40202, Counsel for Petitioners, Texas American Bank and Vincent E. Drain, on January 2, 1985. I further certify that all parties required to be served have been served.

Morton J. Holbrook

Morton J. Holbrook